UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION FILE NO. 5:11-CV-354

L.S., a minor child, by and through his father and next friend, Ron S.; K.C., a minor child, by and through his mother and next friend, Africa H.; ALLISON TAYLOR JOHNS; and D.C., a minor child, by his mother and next friend, Penny C.;

Plaintiffs,

M.S., a minor child, through his parent and natural guardian, Rachelle S.,

Intervenor Plaintiff,

vs.

ALDONA ZOFIA WOS, in her official capacity as the Secretary of the Department of Health and Human Services; PAMELA SHIPMAN, in her official capacity as Area Director of Piedmont Behavioral Health Care Area Mental Health, Developmental Disabilities, and Substance Abuse Authority, and PIEDMONT BEHAVIORAL HEALTHCARE AREA MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE AUTHORITY doing business as PBH,

Defendants.

SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

NOW COME L.S., a minor child, by and through his father and next friend, Ron S.; K.C., a minor child, by and through his mother and next friend, Africa H.; Allison Taylor Johns; D.C., a minor child, by his mother and next friend, Penny C., and M.S., a minor child, through his parent and natural guardian, Rachelle S., on behalf of themselves and the members of the certified class ("Plaintiffs") and the Defendants in this case: Aldona Zofia Wos, in her official capacity as the Secretary of the North Carolina Department of Health and Human Services ("NCDHHS"); Pamela Shipman, in her official capacity as Area Director and Chief Executive Officer of Cardinal Innovations Healthcare Solutions (formerly PBH) and Cardinal Innovations Healthcare Solutions (collectively referred to as "Cardinal") and enter into the following Settlement Agreement ("Agreement"). The Plaintiffs, NCDHHS and Cardinal are hereinafter referred to collectively as "the Parties."

RECITALS

WHEREAS, on July 5, 2011, Plaintiffs filed their Complaint in this case, alleging violations by Defendants of the Medicaid Act and the due process clause of the Fourteenth Amendment to the U.S. Constitution;

WHEREAS, on August 24, 2011, Plaintiffs filed a motion for preliminary injunction;

WHEREAS, on August 29, 2011, Plaintiffs filed a motion to certify class under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure;

WHEREAS, on March 29, 2012, the district court entered an Order granting Plaintiffs' motions to certify class and for preliminary injunction;

WHEREAS, on April 27, 2012, Defendants PBH and Shipman filed their Notice of Appeal from the district court's March 29, 2012 Order granting a preliminary injunction;

WHEREAS, on May 10, 2013, the Fourth Circuit Court of Appeals dismissed the appeal without reaching the merits;

WHEREAS, on June 10, 2013, the Parties conducted the Rule 26(f) conference;

WHEREAS, based on the Parties' productive settlement discussions, the district court extended the deadline for the Rule 26 disclosures and the filing of the Joint Report and Plan on multiple occasions, the most recent being until August 29, 2014;

WHEREAS, the Parties recognize that this case involves legal issues that may take a prolonged time to fully litigate and resolve and further recognize that continued litigation would be an expensive, lengthy and time-consuming matter;

WHEREAS, the Parties agree that neither entering into this Agreement nor the terms of this Agreement shall be construed as an acknowledgment, an admission, or evidence of liability of Defendants under the Constitution or any federal or state law, and this Agreement may not be used as evidence of liability in any other administrative, civil or criminal proceeding;

WHEREAS, the Parties share a mutual interest in seeing that appropriate due process is provided to Participants in the North Carolina Innovations Waiver; and

WHEREAS, the Parties wish to enter into a contingent Settlement Agreement as is fully set forth herein;

NOW THEREFORE, the Parties have decided to resolve this matter in the manner set forth below.

AGREEMENT

I. Definitions.

A. Base Budget Services. The Medicaid-funded array of supports identified as "Base Budget Services" in the North Carolina Innovations Waiver

B. Care Coordinator. An employee of the LME/MCO who assists in coordinating and monitoring Services provided to Innovations Participants.

C. LME/MCO. As defined in N.C. Gen. Stat. § 122C-3(20c).

D. North Carolina Innovations Waiver or "Innovations". The Medicaid home and community-based Services waiver approved under authority of § 1915(c) of the Social Security Act, which is administered by LME/MCOs in North Carolina and overseen by the North Carolina Division of Medical Assistance, a division of the North Carolina Department of Health and Human Services.

E. Participant or "Innovations Participant". A Medicaid beneficiary enrolled in the North Carolina Innovations Waiver, and includes the Participant's legally responsible person or the Participant's service provider when the provider is acting on behalf of the Participant and with the Participant's or legally responsible person's written consent, as allowed by law.

F. Plan of Care. The written plan developed by the Innovations Participant and/or the Participant's legally responsible person, with the assistance of the care coordinator, which specifies, among other things, the specific amount of each Service that the Participant is requesting be authorized, and including any requested amendment or update to the Plan of Care during the Plan Year.

G. **Plan Year**. The period during which an Innovations Participant's Plan of Care is in effect, which begins the first day of the month following the Innovations Participant's birth month, and ends on the last day of the Innovations Participant's next birth month. (Example: an Innovations Participant with a birthdate of June 12 would have a Plan Year running from July 1 through June 30.)

H. **Service Appeal**. An appeal by an Innovations Participant of a denial or limited authorization of a request for Services, or of a reduction, suspension, or termination of previously-authorized Services.

I. **Services**. The Medicaid-funded array of supports offered through the North Carolina Innovations Waiver to Participants.

J. **Support Intensity Scale ® or "SIS ®"**. The instrument currently used by Defendants, or any substantially similar means, to document support needs of an Innovations Participant.

K. **Support Needs Matrix or "SNM"**. The current, or any future substantially similar mechanism used by Defendants, or their agents or contractors, to identify individuals with similar support needs and assign budgets as a guideline for some Innovations Services.

L. **SNM Base Budget**. The annual amount of funding identified by the LME/MCO as a guideline for Base Budget Services for a Participant in a Participant's Plan Year. The SNM Base Budget is not synonymous with the Individual Cost Limit as set forth in Appendix B-2 to the Innovations Waiver, and nothing in this Settlement Agreement shall be construed to affect the Individual Cost Limit.

II. North Carolina Innovations Waiver Services.

A. Implementation of Agreement:

i. No later than 90 days after the court enters its Order of Approval (Exhibit 5), as described in Section III below, unless that time period is extended by agreement of the Parties, Defendants agree to have implemented and begin compliance with this Agreement by implementing and complying with the policies and procedures set out in Sections II(B) through II(H) below with respect to the North Carolina Innovations Waiver. Defendants may certify implementation prior to entry of the Order of Approval such that the monitoring period may begin prior to Court approval as specified in Section III(E)(iii) below.

a. If implementation is certified by counsel for Defendants prior to entry of the Order of Approval by the Court, and an

Innovations Participant receives a decrease in or initial assignment to his or her SNM Base Budget that is effective at the end of the Participant's Plan Year or during the Participant's Plan Year and before the Court enters its Order of Approval (Exhibit 5), Defendants will provide notice of the ability to appeal to reconsideration and to the Office of Administrative Hearings any decrease in or initial assignment to the Participant's SNM Base Budget.

ii. NCDHHS will require that the LME/MCOs who are not parties to this action implement and begin compliance with the policies and procedures set out in Sections II(B), (E), (F), and (G) below, except where otherwise specified, no later than 90 days after the court enters its Order of Approval (Exhibit 5), unless that time period is extended by agreement of the Parties, and with the remaining sections of this Agreement by the date the LME/MCO notifies any Participant of his or her SNM Base Budget.

iii. Nothing in this Agreement shall be construed to obligate Defendant NCDHHS to affirmatively perform a function, responsibility, or requirement imposed by this Agreement that it has delegated or contracted to an LME/MCO; however, Defendant NCDHHS shall be responsible for assuring performance of any requirements imposed by this Agreement which DHHS has delegated or will delegate to LME/MCOs.

iv. Nothing in this Agreement shall be construed to obligate Defendants Cardinal and Shipman to carry out any of the responsibilities or requirements contained in this Agreement with regard to Innovations Participants who are not Cardinal's enrollees.

v. Defendants, through counsel, will notify class counsel in writing on the date on which Defendants have fully implemented and are in compliance with Section II of this Agreement. That date shall be used in connection with the time periods set forth in Sections III(E)(iii)(a) and (b) below. If Plaintiffs dispute whether Defendants have fully implemented and are in compliance with this Agreement as of the date of notification of implementation by Defendants, Plaintiffs may raise that concern by following the procedures in Section VI(A), below; however, the date of implementation as indicated by Defendants shall not be changed, regardless of the outcome of any dispute resolution attempt.

vi. Beginning with the date of implementation, the terms of Section II of this Agreement will apply to events and decisions occurring after that date in all pending Service requests and Service Appeals.

B. **Support Intensity Scale ® ("SIS ®") Evaluations**. When Innovations Participants are notified of the results of a new SIS ® evaluation, LME/MCOs will inform the Participant and/or Participant's legally responsible person in writing of the opportunity and process for raising concerns regarding the SIS ® evaluation. Such processes shall include an opportunity to discuss the results of the SIS ® evaluation with the LME/MCO and the potential for results to be adjusted if it is determined particular support needs of the individual were not accurately captured, as well as the opportunity to file a grievance. The failure to request a grievance shall not be a waiver of the Participant's ability to argue that the results of the SIS ® are incorrect in requesting Services or during a Service Appeal.

C. **Support Needs Matrix ("SNM") Base Budget Letters**. When new Innovations Participants are notified of their initial SNM Base Budgets, or when Innovations Participants are notified of decreases in their SNM Base Budgets, LME/MCOs will inform the Participant and/or Participant's legally responsible person in writing of the following:

i. The Participant may request Services that cost in excess of his or her SNM Base Budget if he or she believes his or her needs cannot be met within his or her SNM Base Budget;

ii. The results of a SIS ® and the SNM Base Budget are guidelines that do not constitute a binding limit on the amount of Services that may be requested or authorized in a plan. This means if all criteria unrelated to the SNM Base Budget to receive a Service are met, and the LME/MCO determines that it is medically necessary for an Innovations Participant to have an array of Base Budget Services authorized in excess of the Participant's SNM Base Budget, the LME/MCO will authorize such Services.

iii. If the Participant makes a request for authorization of Services and that request is denied, in whole or in part, Defendants will, at the time of the denial, provide notice of the reasons for the decision and the process for seeking an appeal of such decision; and

iv. Should the Participant wish to pursue a grievance regarding his or her SNM Base Budget, the process for doing so.

The written information provided does not need to contain the exact language used in Section II(C)(i) – (iv) above but will not contain any material differences in meaning from the above language.

The failure of a Participant to request a grievance identified in Section II(C)(iv) above is not a waiver of the Participant's ability to argue the Participant's SNM Base Budget is insufficient or incorrect in requesting Services or during a Service Appeal.

D. <u>SNM Base Budget Procedures during a Plan Year</u>.

i. **<u>No Base Budget Changes Effective Mid-Plan Year for One Year after Implementation:</u>** During the one (1) year period after implementation of this Agreement and prior to dismissal of this case:

a. Defendants Cardinal and Shipman agree not to reduce an Innovations Participant's SNM Base Budget effective during that Participant's Plan Year or provide notice of a new SNM Base Budget for a Participant that is effective during the Participant's then-current Plan Year and less than the cost of Base Budget Services authorized in the Participant's then-current Plan of Care; and

b. Defendant NCDHHS shall require that, if other LME/MCOs implement SNM during that one (1) year period, that during such one (1) year period other LME/MCOs do not reduce an Innovations Participant's SNM Base Budget effective during a Plan Year, or provide notice of a new SNM Base Budget for a Participant that is effective during the Participant's then-current Plan Year and less than the cost of Base Budget Services authorized in the Participant's then-current Plan of Care.

ii. **<u>Procedures for Mid-Plan Year Base Budget Changes for Two Years after Dismissal of this Case:</u>** Subsequent to dismissal of this case and during the two year period thereafter that this Agreement remains in effect, if an LME/MCO: (1) reduces one of its Innovations Participant's SNM Base Budgets effective during that Innovations Participant's Plan Year; or (2) upon implementation of SNM by an LME/MCO, provides notice of a new SNM Base Budget for a Participant that is effective during the Participant's then-current Plan Year and which is less than the cost of authorized Base Budget Services in the Participant's then-current Plan of Care, the LME/MCO shall:

a. Provide notice of the right to a Service Appeal if the SNM Base Budget reduction or initial assignment results in a denial, reduction or termination of Services; or

b. Ensure existing authorizations for Services are not affected by the reduction in the SNM Base Budget.

iii. Notwithstanding the foregoing, reductions in the SNM Base Budget are permitted effective during a Plan Year and notice and due process rights are not required if an Innovations Participant changes residential setting which is the sole basis for the reduction in the SNM Base Budget. During the time this Agreement is in effect, a letter notifying a Participant of a reduction in a Participant's SNM Base Budget or a new SNM Base Budget that is not effective until the Participant's new Plan Year will not require an LME/MCO to provide a notice with appeal rights to the Participant but will require LME/MCOs to provide the letter described in Section II(C) above.

E. <u>Requests for Authorization of Services</u>.

i. To the extent a Care Coordinator or another LME/MCO employee facilitates or assists in making a Participant's request for authorization of Services, the LME/MCO will assure that the request shall be made in a manner consistent with the desires of the Participant and that those desires are reflected in the Participant's Plan of Care, including desires for the type, amount, and duration of Services. LME/MCOs will follow the timeframes set forth in 42 C.F.R. § 438.210(d) in reviewing requests for authorization of Services. Participants may make a new request for Services at any time by requesting an update of the Plan of Care.

ii. When discussing a proposed Plan of Care with a Participant, an LME/MCO Care Coordinator will discuss the duration of a Service expected by the Participant, and the LME/MCO Care Coordinator will assure that the proposed Plan of Care requests authorization for that Service at the duration expected by the Participant during that Plan Year. If the LME/MCO authorizes the Service for a duration less than as requested in the Plan of Care, unless the Service has a maximum benefit duration contained within the Innovations Waiver and the LME/MCO authorizes the Service requested up to that maximum, the LME/MCO must provide written notice with appeal rights at the time of that limited authorization, which notice will include the clinical reasons for the decision.

iii. The results of a SIS ® and the SNM Base Budget are guidelines that do not constitute a binding limit that may not be exceeded on the amount of Services that may be requested or authorized in a Plan of Care, or requested or authorized in a Service Appeal. This means if all criteria unrelated to the SNM Base Budget to receive a Service are

met, and the LME/MCO determines, or the final results of a Service Appeal determine, that it is medically necessary for an Innovations Participant to have an array of Base Budget Services authorized in excess of the Participant's SNM Base Budget, the LME/MCO will authorize such Services, without requiring that an Innovations Participant request "intensive review."

iv. If the LME/MCO denies a request for authorization of Services by an Innovations Participant, in whole or in part, or authorizes a requested Service in a limited manner (including the type, level, or duration of service), LME/MCOs will, at the time of such denial or limited authorization, provide written notice and due process rights in accordance with 42 C.F.R. § 438.404. If an LME/MCO is utilizing the SNM and denies a request for authorization of Services, and the Services requested cost in excess of that Innovation's Participant's SNM Base Budget, the written notice shall explain that if a Service Appeal is requested, and if it is determined on appeal that Services in excess of the SNM Base Budget are medically necessary, the LME/MCO will authorize such Services.

v. An appeal of a notice denying a Service request or providing limited authorization of a requested Service shall not prevent the Service that was authorized from being provided pending the outcome of the appeal. A pending appeal also shall not prevent a Participant from making a new request for Services.

F. **Reductions, Suspensions, or Terminations of Previously-Authorized Services**. If an LME/MCO reduces, suspends, or terminates an Innovations Participant's Services during an existing authorization period (as previously authorized based on a request for services in a Plan of Care), the LME/MCOs shall, upon the request of the Participant, continue the Innovations Participant's benefits as set forth in 42 C.F.R. § 438.420, if all the requirements in 42 C.F.R. § 438.420 are met. Nothing in this Settlement Agreement shall be construed to address whether or not benefits are required to continue after the expiration of the authorization period.

G. **Discouragement Protections**.

i. Defendants will implement procedures to protect all Innovations Participants from discouragement, coercion, or misinformation about the amounts of Services they may request in their plans of care or their right to appeal the denial, reduction or termination of a Service, except LME/MCOs who have not implemented the SNM need not address SNM Base Budgets or the SNM in their procedures unless and until they implement the SNM. Nothing in this Agreement shall

be construed to require an LME/MCO to implement the SNM at any particular time.

ii. Defendants shall not attempt to influence, limit, or interfere with a Participant's right or decision to file or pursue a grievance, request for an LME/MCO level appeal, or a contested case hearing.

iii. Examples of prohibited discouragement include but are not limited to the following actions by a Care Coordinator or other LME/MCO employee or agent:

a. Informing an Innovations Participant that he or she cannot request:
    i. a particular Service or amount or frequency or duration (within a Plan Year) of a particular Service;
    ii. Services in excess of the Participant's SNM Base Budget. Notwithstanding Section II(A) of this Agreement above, LME/MCOs not currently implementing the SNM do not need to comply with this subsection unless and until they implement the SNM;
    iii. Services in excess of any other limit.

b. Informing an Innovations Participant that he or she must sign a Plan of Care that does not contain the Services the Participant wishes to request or that Services cannot be requested in a Plan of Care or authorized for the entire Plan Year. Nothing in this section shall prevent LME/MCO employees or agents from explaining the maximum benefit duration or amount of a Service if such a limit is contained in the Innovations Waiver, or prevent an LME/MCO from denying a request for services or authorizing the request in a duration that was less than requested if the LME/MCO complies with the process outlined in Section II(E)(ii) above.

c. Informing an Innovations Participant that if a request for authorization of Services is denied, he or she may not appeal from that denial.

d. Failing to assist in preparation of a Plan of Care that contains the Services the Innovations Participant wishes to request, even if the Care Coordinator has explained alternative Service options that may be appropriate.

e. Threatening to make a claim for attorney's fees or otherwise retaliate against the Participant if he or she appeals.

f. Threatening recoupment of the cost of continuation of benefits, as defined in 42 C.F.R. § 438.420, in order to discourage an appeal, except that Defendants may inform Participants of the circumstances in which certain persons can be held responsible for that cost (i.e. the Participant, the parent of a minor Participant, or the spouse of a Participant may be responsible if the appeal is lost and the disputed level of Services was continued pending appeal).

iv. Defendants shall not intentionally provide material misinformation to any Innovations Participant that has the foreseeable effect of significantly discouraging requests for Services, the filing or prosecution of administrative appeals, or the reporting of violations of this Agreement.

v. Defendant NCDHHS shall instruct all LME/MCOs to take reasonable steps to ensure that no employee of the LME/MCO serves as a guardian in his or her official capacity for a Medicaid beneficiary currently served by the employing LME/MCO. To the extent an LME/MCO or an employee of the LME/MCO is currently acting as a guardian in an official capacity for a Medicaid beneficiary currently served by that LME/MCO, NCDHHS shall instruct that LME/MCO to take step to effectuate the transfer of guardianship. To the extent any employee of an LME/MCO acts as guardian in his or her individual capacity for someone currently served by that LME/MCO, Defendant NCDHHS will instruct the LME/MCO to take reasonable steps to ensure mitigation of any potential conflict of interest. Defendants Cardinal and Shipman agree to affirmatively comply with this subsection with regard to its employees.

vi. Care coordinators shall affirmatively assist Participants in developing plans of care by offering and explaining options regarding the Services available to them. Nothing in this Agreement shall be construed to prevent clinical or treatment discussions between Defendants, Participants, and providers.

vii. Defendants shall not tell any Innovations Participant that he or she must sign a Plan of Care with which he or she does not agree. This does not prevent Defendants from informing a Participant that there must be a signed Plan of Care in order to receive Services under the Innovations Waiver except that in providing this information,

Defendants must explain that the required signed Plan of Care should include the Services being requested by the Participant, and that the decision on what Services are authorized is made by Utilization Management, which may differ from the Services that are requested.

viii. Defendants shall ensure that LME/MCO Care Coordinators do not ask an Innovations Participant to sign a blank or incomplete Plan of Care, or ask an Innovations Participant to sign a Plan of Care prepared by the LME/MCO without discussing the draft with the Participant and offering to make any requested changes prior to signature.

ix. LME/MCO Care Coordinators will not request an Innovations Participant to submit or update his or her Plan of Care to request Services costing less than or equal to the reduced SNM Base Budget as a result of a reduction in his or her SNM Base Budget. Nothing in this subsection shall be construed to prevent an Innovations Participant from requesting Services costing less than or equal to the reduced SNM Base Budget, or any other array of Services, if he or she wishes to do so, nor shall anything in this subsection be construed to conflict with subsection II(G)(x) below.

x. Nothing in this section shall be construed to prevent Defendants from offering alternative Services, engaging in clinical or educational discussions with Participants or providers, or engaging in informal attempts to resolve Participant concerns prior to the issuance of a notice of an appealable decision. Furthermore, nothing in this section shall prohibit Defendants from explaining that a request may be denied and suggesting alternative Services, or explaining the enrollee appeals process, including the LME/MCO's right to recoup from the Participant or a parent of a minor Participant or spouse of a Participant the cost of Services paid for by an LME/MCO under continuation of benefits, as defined in 42 C.F.R. § 438.420, during the pendency of the appeal if the LME/MCO ultimately prevails, so long as Defendants make clear that the Participant has the right to request authorization of the Services he or she wants to request.

H. <u>Stakeholder Education:</u> No later than the date of implementation as described in Section II(A) above, to the extent the terms of this Agreement make already existing written materials, procedures, or trainings inconsistent with this Agreement, Defendants agree to make such changes to make the content of the written materials, procedures, or trainings consistent with the terms of this Agreement. Furthermore:

i. "Changing" or "updating" materials, as described in this Section and its subsections, does not require reprinting and re-mailing materials outside of the ordinary course of business. At the next reprinting or re-mailing of such materials that occurs in the ordinary course of business after December 31, 2014, or earlier at the discretion of Defendants, such materials shall reflect the prior changes made to electronically posted versions of the materials. Otherwise, implementation of this Agreement, as described in Section II(A) above, only requires updates to the electronic versions of such materials, procedures, and trainings, and reasonable notice to prior recipients of the information that is being changed.

ii. No later than the date of implementation as described in Section II(A) above, Defendant Cardinal will train its relevant staff on the requirements of Section II of this Agreement, and Defendant Cardinal shall provide to class counsel a copy of materials used during the training.

iii. No later than the date of implementation as described in Section II(A) above, Defendant Cardinal will update its materials provided to Participants and publicly-posted online materials to reflect the information contained in Sections II(E), II(G)(ii), II(G)(iii), and II(G)(vi) – (ix) of this Agreement. Defendant Cardinal will update such materials in a manner reflective of the language contained in Appendix A to this Agreement. The written information provided does not need to contain the exact language used in Appendix A, but will not contain any material differences in meaning from the language contained therein. No later than the date of implementation as described in Section II(A) above, Defendant Cardinal will provide copies of such materials to class counsel. During Defendant Cardinal's next annual mailing to its enrollees, Defendant Cardinal will provide a link to its website (www.cardinalinnovations.org or one of its subdomains or subpages) where the materials referenced in this subsection will be posted, along with information about how its enrollees may request hard copies of such materials, as well as a brief explanation of the content of the updates to such materials.

iv. No later than the date of implementation as described in Section II(A) above, in at least one of Defendant Cardinal's weekly newsletters to its network providers, Defendant Cardinal will provide a link to its website (www.cardinalinnovations.org or one of its subdomains or subpages) where the materials referenced in Section H(iii) above will be posted, as well as a brief explanation of the content of the updates to such materials.

v. If class counsel believes the documents provided to them by Defendant Cardinal constitute substantial non-compliance with this Agreement, Plaintiffs may address that concern by following the procedures in Section VI(A), below; however, as indicated in Section II(A) above, the date of implementation as indicated by Defendants shall not be changed, regardless of the outcome of any dispute resolution attempt.

vi. No later than the date of implementation as described in Section II(A) above, Defendant NCDHHS will provide training to the LME/MCOs that are not parties to this Agreement regarding Section II(B), (E), (F) and (G) of this Agreement. Defendant NCDHHS shall provide a copy of the materials used during the training to class counsel. Defendant NCDHHS will ensure that the LME/MCOs that are not parties to this Agreement will:

a. No later than the date of implementation as described in Section II(A) above, train their relevant staff on the requirements of Section II (B), (E), (F) and (G) of this Agreement.

b. Update their materials provided to Participants and providers and publicly-posted online to reflect the information contained in Sections II(E)(i), (ii), (iv), and (v) and II(G)(ii), (iii), (vi), and (viii). The updates will be in a manner reflective of the language contained in Appendix A to this Agreement, however, any written information provided does not need to contain the exact language used in Appendix A but will not contain any material differences in meaning from the language contained therein.

vii. The LME/MCOs that are not parties to this Agreement and who have not implemented the Supports Needs Matrix shall not be required to update, revise, or amend any of their written materials or train their relevant staff on the provisions of this Agreement related to the Supports Need Matrix until immediately prior to when the LME/MCO first notifies an Innovations Participant of his or her SNM Base Budget.

III. Entry of Order of Approval: This Agreement is expressly made contingent upon the Court's approval of this Settlement Agreement and entry of Order(s) approving this Agreement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and Local Rule 17.1 of the Eastern District of North Carolina.

A. Required Attachments: Attached hereto are the following:

i. Summary of the Provisions of this Agreement to be Provided to Participants and Providers (Appendix A)

ii. Joint Expedited Motion and Attached Supporting Memorandum of Law For Preliminary Approval of Settlement Agreement, Notice to Class Members, Scheduling of Fairness Hearing, Final Approval of Settlement Agreement and Clarification of Class Definition ("Joint Motion") (Exhibit 1);

iii. [proposed] Order Preliminarily Approving Proposed Settlement and Directing Notice to the Class (Exhibit 2);

iv. [proposed] Notice Publication Schedule (Exhibit 3)

v. [proposed] Notice to Class Members of Settlement (Exhibit 4);

vi. [proposed] Order of Approval of Settlement (Exhibit 5);

vii. [proposed] Order of Dismissal with Prejudice (Exhibit 6);

viii. Class List as of November 19, 2014 (Exhibit 7);

ix. Joint Statement of the Parties (Exhibit 8)

B. **Approval by the Court**: In entering into this Agreement the Parties are aware that, pursuant to Rule 23 of the Federal Rules of Civil Procedure and Local Rule 17.1 of the Eastern District of North Carolina, the Court must approve the terms of this Agreement and make certain findings in support of its approval. The Parties agree that the Court is not to retain jurisdiction of this matter following entry of the Order of Dismissal with Prejudice (Exhibit 6). The Parties further agree that any Order which modifies or alters the understandings of the Parties as set forth herein, or which creates additional obligations upon the Parties, will render this Agreement voidable at the election of any Party to this Agreement, provided notice of voiding the Agreement is given to opposing counsel within thirty (30) days of notice of any such Order, with the exception that if the March 29, 2012 preliminary injunction order and opinion is not vacated, that does not render this Agreement voidable.

C. **Definition of the Class**: The Parties and their counsel further agree and understand that, as reflected in the Joint Motion:

i. If this Agreement is approved by the Court, and not otherwise voided, the certified class in this case shall consist of all individuals enrolled in the Innovations Waiver during the time period that this Agreement is in effect, including individuals who enroll in the Innovations Waiver subsequent to the approval of this Agreement by the Court and prior to

dismissal of this case. Within thirty (30) days of Approval of this Agreement by the Court, Defendants, through counsel, shall provide to class counsel the names, addresses, and phone numbers for all Innovations Participants. During the one (1) year period between implementation of this Agreement and dismissal of this case, within thirty (30) days of an individual becoming enrolled in Innovations and becoming an Innovations Participant, Defendants shall provide class counsel with the names, addresses, and phone numbers of those individuals.

ii. If this Agreement is not approved by the Court, or is otherwise voided prior to dismissal of this case, the certified class consists only of the individuals identified on the attached Master Class List (Exhibit 7), as well as any Innovations Participants who receive a reduction in their SNM Base Budget during the time this Agreement is in effect prior to it being voided, as well as individuals who receive a reduction in their SNM Base Budget subsequent to the voiding of this Agreement.

iii. If this Agreement is voided prior to dismissal of this case, counsel for Defendants will provide the names, addresses, and phone numbers for the additional class members identified in Section III(C)(ii) above within thirty (30) days of the date this Agreement is voided.

D. Non-Incorporation of this Agreement: The Parties agree that the terms of this Agreement are not to be incorporated into any order of the Court and that other than the [proposed] Order Preliminarily Approving Proposed Settlement and Directing Notice to the Class, (Exhibit 2); the [proposed] Order of Approval of Settlement (Exhibit 5); the [proposed] Order of Dismissal with Prejudice, (Exhibit 6); no further orders shall be necessary to effectuate this Agreement.

E. Effectuation of Settlement Agreement: Following execution of this Agreement by the Parties, counsel will submit to the Court the Joint Motion, which shall request the Court to:

i. Hold a fairness hearing;

ii. Approve the Settlement Agreement;

iii. Place the above-captioned action on the inactive docket; and

a. If this Agreement is approved by the Court on or before December 31, 2014, one year following the implementation of the Settlement Agreement, as described in Section II(A) above, or the date of Court approval, whichever comes last, dismiss the above-captioned action with prejudice, except that the

Order of Dismissal shall not be issued by the Court while dispute resolution under Section VI(A) below is pending, but shall be issued immediately upon a successful resolution to such a dispute; or

b. If this Agreement is not approved by the Court on or before December 31, 2014, notwithstanding the continued, expedited, and best efforts by all counsel to obtain Court Approval prior to that date, and the Defendants have certified implementation prior to the date of Court Approval, then the Court will dismiss the above-captioned action with prejudice on December 31, 2015, except that the Order of Dismissal shall not be issued by the Court while dispute resolution under Section VI(A) below is pending, but shall be issued immediately upon a successful resolution to such a dispute.

The Parties will request the Court to expedite the scheduling of the fairness hearing, and counsel will work together to facilitate the fairness hearing. All counsel will use their continued and best efforts to obtain court approval of the Settlement Agreement and the above-referenced Orders.

F. **The March 29, 2012 Preliminary Injunction**:

i. Upon the date of Court approval or of Defendants' certification of implementation of this Agreement, whichever comes last, the Parties agree that the terms of the Court's March 29, 2012 Preliminary Injunction are stayed indefinitely.

ii. If this Agreement becomes void under Section III(B) above or Section VI(A)(ii) below, the terms of the Court's March 29, 2012 Preliminary Injunction shall be stayed for ninety (90) days subsequent to the date this Agreement becomes void, after which the terms of the Court's March 29, 2012 Preliminary Injunction shall be in full effect, unless, within thirty (30) days of the date of this Agreement becoming void, Defendants file a Motion for Relief from the Preliminary Injunction (or other similar Motion).

a. If Defendants file such a Motion, the Parties agree to collaborate and propose an expedited briefing schedule to the Court, and the terms of the March 29, 2012 Preliminary Injunction shall remain stayed until Defendants' Motion is ruled upon by the Court and such ruling denies Defendants' Motion, or otherwise reinstates the terms of the March 29, 2012 Preliminary Injunction. In either event, the terms of the Court's Order on Defendant's Motion shall control.

iii. Nothing in this Agreement shall be construed to constitute an agreement between the parties as to the meaning, interpretation, or implementation of the March 29, 2012 Preliminary Injunction. The Parties further agree that if this Agreement does not become void, the March 29, 2012 preliminary injunction, whether or not vacated by the Court, shall have no preclusive, persuasive or precedential effect in any future litigation that may occur between the Parties.

iv. No later than 270 days after implementation of this Agreement, as described in Section II(A) above, Defendants may move to vacate the March 29, 2012 Preliminary Injunction order and opinion effective upon dismissal of this case, and Plaintiffs agree not to oppose such Motion on procedural grounds and consent to the Court granting leave to file such Motion. Plaintiffs agree that if such Motion is filed, Plaintiffs will not oppose such Motion, but may submit a list of authority they believe is pertinent to the Court's consideration of such Motion.

IV. Attorneys Fees. Within thirty (30) days of approval of this Settlement Agreement by the Court at the hearing, Defendants shall deliver to the National Health Law Program as trustee a check in the amount of $375,000 for expenses, costs and attorneys' fees. These funds are not immediately disbursable to Plaintiffs' counsel and shall be held in trust in an interest bearing trust account (with any interest paid to the N.C. IOLTA program) until the Order of Dismissal with Prejudice (Exhibit 6), is entered by the Court. At that time, the trustee shall cause these funds to be disbursed in a manner agreed upon by Plaintiffs' counsel. The payment of these funds will satisfy in full any claim by Plaintiffs for attorneys' fees under 42 U.S.C. § 1988. Alternatively, should the Order of Dismissal with Prejudice not be entered by the Court, then the trustee shall remit the sum of $375,000 to NCDHHS.

V. Term; Material Change in Law or Fact. If this Agreement is approved by the Court, all Parties shall be bound by the terms of the Agreement from the date the Court enters the Order of Approval of Settlement (Exhibit 5), until two (2) years after the Court enters the Order of Dismissal with Prejudice (Exhibit 6). During this time, all terms of this Agreement shall remain in effect, unless and until there is a material change in the law or facts that are the basis of this Agreement. Two years after the date the Court enters the Order of Dismissal with Prejudice, no Party shall be bound by the terms of this Agreement any longer, except that the Parties shall still remain bound by the Release set forth in Section VIII.

VI. Dispute Resolution. It is the Parties' intent to pursue a problem-solving approach so that disagreements can be minimized and resolved amicably, without resorting to further litigation. Only substantial non-compliance shall constitute a breach of the Agreement. Substantial non-compliance with this Agreement occurs when there are violations of the Agreement that are significant, repeated, and systemic in nature.

A. **Following Entry of Order of Approval**. During the period between the date of Defendants' notification to Plaintiffs of implementation of this Agreement, as described in Section II(A) above, and the date of the Court's entry of the Order of Dismissal (during which time this case shall be placed on the Court's inactive docket), the Parties agree to employ the following in an effort to resolve any disputes that might arise related to this Agreement.

i. If Plaintiffs believe that Defendants have taken an action, or failed to take an action, that amounts to substantial non-compliance with the requirements of this Agreement, Plaintiffs' counsel may submit information to Defendants' counsel suggestive of such substantial non-compliance. Plaintiffs will submit such information no later than 30 days before the one year period expires. Defendants will promptly investigate the information and Defendants' counsel will meet and confer with Plaintiffs' counsel regarding their findings within forty-five (45) days of the date Plaintiffs' counsel submits the information. Thereafter, Plaintiffs' counsel will inform Defendants' counsel within fourteen (14) days whether they are satisfied with the information provided, such satisfaction not to be unreasonably withheld. If not, Plaintiffs' counsel will give Defendants' counsel written notice which details with specificity the matters alleged to be substantially out of compliance and the facts and information upon which Plaintiffs base their allegations of substantial non-compliance to enable Defendants to attempt to cure the alleged substantial non-compliance.

ii. If the alleged substantial non-compliance is not cured to the satisfaction of Plaintiffs' counsel (such satisfaction not to be unreasonably withheld) within twenty (20) days of Plaintiffs' written notice, then either party may request a conference with a magistrate assigned by the court for the purpose of attempting to resolve the dispute through mediation. If such efforts at mediation fail, this settlement agreement shall become void, the Parties shall request the Court to place the case back on the active docket, and the litigation shall resume.

B. **Following Entry of Order of Dismissal with Prejudice**. During the two (2) year period following the Court's entry of the Order of Dismissal that the Parties remain bound by the terms of this Agreement, the Parties agree to employ the following in an effort to resolve any disputes that might arise related to this Agreement.

i. If Plaintiffs believe that Defendants have taken an action, or failed to take an action, that amounts to substantial non-compliance with the requirements of this Agreement, Plaintiffs' counsel may submit information to Defendants' counsel suggestive of such substantial non-compliance. Defendants will promptly investigate the information and Defendants' counsel will meet and confer with Plaintiffs' counsel

regarding their findings within forty-five (45) days of the date Plaintiffs' counsel submits the information. Thereafter, Plaintiffs' counsel will inform Defendants' counsel within fourteen (14) days whether they are satisfied with the information provided, such satisfaction not to be unreasonably withheld. If not, Plaintiffs' counsel will give Defendants' counsel written notice which details with specificity the matters alleged to be substantially out of compliance and the facts and information upon which Plaintiffs base their allegations of substantial non-compliance to enable Defendants to attempt to cure the alleged substantial non-compliance.

ii. If the alleged substantial non-compliance is not cured to the satisfaction of Plaintiffs' counsel (such satisfaction not to be unreasonably withheld) within twenty (20) days of Plaintiffs' written notice, then either party may request a conference with a mutually-agreeable mediator for the purpose of attempting to resolve the dispute through mediation, with mediation expenses to be shared equally between Plaintiffs and Defendants if a pro bono mediator cannot be identified and mutually agreed to by the Parties.

iii. This Agreement represents a contract between the Parties. In the event that mediation fails, any Party, including any individuals who were members of the certified class in this action as of the date of dismissal in this case may file a breach of contract action in Superior Court in Wake County, North Carolina no later than two (2) years after the date of dismissal of this case.

C. **No Contempt of Court.** Nothing herein gives any party a right to attempt to hold any other party in contempt of court.

VII. **North Carolina Law.** The laws of the State of North Carolina and of the United States shall govern this Agreement.

VIII. **Release.** If this Agreement is approved by the Court and the case is dismissed with prejudice, upon entry of the Order of Dismissal with Prejudice, it is the Parties' intent that Plaintiffs and Defendants shall release one another from all claims related to the civil action now styled, *L.S. et al. v. Wos et al.*, No. 5:11-CV-354 (the "Lawsuit"). Notwithstanding this general release, as stated in Section II(F), nothing in this Settlement Agreement shall be construed to address whether or not benefits are required to continue after the expiration of an authorization period

A. **Release by Plaintiffs.** Upon entry of the Order of Dismissal with Prejudice, Plaintiffs, on behalf of themselves and the members of the certified class, hereby release Defendants, their officials, employees, agents, representatives, successors and assigns from any and all claims, demands, actions, causes of action, damages, costs and expenses that

were raised or could have been raised based upon the factual allegations contained in the amended complaint or intervenor complaint based upon events or actions occurring prior to the effective date of this Agreement, with the exception of Plaintiffs' claim that Services are required to continue pending the outcome of an appeal after the expiration of an authorization period, which is specifically reserved.

B. Release by Defendants. Upon entry of the Order of Dismissal with Prejudice, Defendants hereby release Plaintiffs, their officials, employees, agents, representatives, successors and assigns from any and all claims, demands, actions, causes of action, damages, costs and expenses which Defendants ever had, now have, or hereinafter can, shall, or may have, by reason of anything occurring, done or omitted to be done by Plaintiffs as of, or prior to, the effective date of this Agreement relating to the Lawsuit.

IX. Joint Statement. The Parties and their legal counsel agree that, following entry of the Order of Dismissal with Prejudice, they shall release a joint statement in the form set forth in Exhibit 8 regarding the resolution of this case. The Parties and their legal counsel further agree that they shall not otherwise make any public statements regarding the resolution of this case.

X. Merger. The parties agree and acknowledge that this written Agreement sets forth all of the terms and conditions between them concerning the subject matter of this Agreement, superseding all prior oral and written statements and representations, and that there are no terms or conditions between the parties except as specifically set forth in this Agreement.

XI. Amendments. Any amendment or modification to this Agreement must be in writing and signed by all Parties.

XII. Third Party Beneficiaries. Other than the Parties, including members of the certified Plaintiff class, no person or entity is intended to be a third party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no third party or entity may assert any claim or right as a beneficiary under this Agreement in any civil, criminal, or administrative action. Neither third parties, nor the Court, shall have the ability to modify the terms set out in this Agreement without consent of all Parties.

XIII. No Strict Interpretation Against Draftsman. The parties have participated in the drafting of this Agreement and have had the opportunity to consult with counsel concerning its terms. This Agreement shall not be interpreted strictly against any one party on the ground that it drafted the Agreement or any part of it.

XIV. Voluntary Acceptance of Terms. The Parties represent and acknowledge that this Agreement is the result of extensive, thorough and good faith negotiations. The Parties further represent and acknowledge that the terms of this Agreement have been voluntarily accepted, after consultation with counsel, for the purpose of making a full and final compromise and settlement of any and all claims, allegations, or defenses set forth by the Parties in the Lawsuit.

XV. **Recitals and Headings**. All parts and provisions of this Agreement, including the recitals, paragraph headings, and exhibits, are intended to be material parts of the Agreement.

XVI. **Authority to Settle**. Each Party to this Agreement represents and warrants that the person who has signed this Agreement on behalf of his or her entity is duly authorized to enter into this Agreement and to bind that Party to the terms and conditions of this Agreement. The signatures below of officials or attorneys representing the Parties signify that all Parties have given their approval to this Agreement, subject to approval by the United States District Court for the Eastern District of North Carolina.

XVII. **Facsimile or Emailed Signatures Binding**. In order to expedite the signing of this Agreement, the Parties stipulate and agree that the delivery of an executed signature page by one party to the other via facsimile transmission or email of a PDF copy shall bind the transmitting party to the same extent as service of the original signature page by hand delivery. The Parties stipulate and agree that a party that sends a signature page via facsimile transmission or email shall mail the original to the other party within five (5) business days after the facsimile transmission or email.

XVIII. **Counterparts**. This Agreement may be executed in counterparts, each of which shall be deemed an original, and the counterparts shall together constitute one and the same Agreement, notwithstanding that each party is not a signatory to the original or the same counterpart. All references to signature or execution of the Agreement shall be calculated from the date on which the last party executed the Agreement.

XIX. **Effective Date**. This Agreement shall become effective on the date when the last of the Parties signs the Agreement.

XX. **Binding Effect**. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have executed three (3) original copies of this Agreement.

[SIGNATURE PAGES FOLLOW ON PAGES 23 - 29]

THIS SETTLEMENT AGREEMENT agreed to and executed by the Parties hereto:

PLAINTIFF L.S., a minor child, by and through his father and next friend, R[redacted] S.:

By: [redacted]

Printed Name

[redacted]

Signature

11/25/14

Date

THIS SETTLEMENT AGREEMENT agreed to and executed by the Parties hereto:

PLAINTIFF K.C., an incompetent adult, by and through his mother and guardian, [redacted] H.:

By: [redacted] H[redacted]
Printed Name

[redacted]
Signature

11/25/14
Date

THIS SETTLEMENT AGREEMENT agreed to and executed by the Parties hereto:

PLAINTIFF [redacted]

By: [redacted]
Printed Name

[redacted]
Signature

11-24-14
Date

THIS SETTLEMENT AGREEMENT agreed to and executed by the Parties hereto:

PLAINTIFF D.C., a minor child, by and through his mother and next friend, P[redacted]C.:

By: P[redacted]C[redacted]
Print Name

G[redacted]C[redacted]
Signature

11/20/2014
Date

THIS SETTLEMENT AGREEMENT agreed to and executed by the Parties hereto:

INTERVENOR PLAINTIFF M.S., an incompetent adult, by and through his mother and guardian, R[redacted]S.:

By: R[redacted] S[redacted] for M.S.

Printed Name

[redacted] for M.S.

Signature

11/21/14

Date

THIS SETTLEMENT AGREEMENT agreed to and executed by the Parties hereto:

DEFENDANT ALDONA ZOFIA WOS, in her official capacity as the Secretary of the North Carolina Department of Health and Human Services

By: Aldona Zofia Wos
Printed Name

Secretary
Official Title

[redacted]
Signature

12/9/2014
Date

THIS SETTLEMENT AGREEMENT agreed to and executed by the Parties hereto:

DEFENDANT PAMELA SHIPMAN, in her official capacity as Chief Executive Officer of CARDINAL INNOVATIONS HEALTHCARE SOLUTIONS

By: Pamela L Shipman
Printed Name

CEO
Official Title

[redacted]
Signature

11-21-14
Date

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act, N.C. Gen. Stat. Chapter 159.

By: A. Victor Fields
Printed Name

CFO
Official Title

[redacted]
Signature

11/20/14
Date